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VIA ECF

Hon. Matthew F. Leitman
Federal Building and U.S Courthouse
600 Church Street, Room 125
Flint, MI 48502

NOTICE OF SUPPLEMENTAL AUTHORITY

Re: United States v. Bonner, Cr. No. 16-20055

Dear Judge Leitman:

On January 28, 2021, U.S. Attorney's Office reported that "it does not appear that Bonner has been offered the vaccine yet, but believed that Fort Dix has received some doses. [The Bureau of Prisons] did not provide any specific information regarding the timing of when the vaccine would be available to Mr. Bonner." Ex. A, email from AUSA. Later that day, this Court found that Mr. Bonner had already served a sufficiently long sentence considering his medical vulnerabilities, his rehabilitative efforts, and the severe punishment of the lockdown conditions at FCI Fort Dix. Nonetheless, the Court stayed the order to identify how quickly Mr. Bonner could be vaccinated by the Bureau of Prisons ("BOP"). I write to provide supplemental authority to explain why Mr. Bonner's life remains at risk, even if should he to receive a vaccination tomorrow. We respectfully urge this Court to execute the order for compassionate release immediately.

Mr. Bonner's life remains at risk, even if vaccinated tomorrow

First, even if Mr. Bonner were vaccinated tomorrow, he would remain at risk of severe illness or death until weeks after the second dose. The CDC warns:

It typically takes a few weeks for the body to build immunity (protection against the virus that causes COVID-19) after vaccination. That means it's possible a person could be infected with the virus that causes COVID-19

just before or just after vaccination and still get sick. This is because the vaccine has not had enough time to provide protection.¹

It is also well-reported that one shot is not fully protective.² In other vaccines, around 40% of people who have received just one dose are not protected, compared to 4% of those who have had their second.³ There is no reason to believe that the COVID-19 vaccine works any differently.

Second, supply chain delays in vaccine production also make it difficult to predict if Mr. Bonner can even receive the second dose. According to Dr. Rochelle Walensky, director of the CDC, the Biden administration is yet unable to figure out exactly what is holding up the national Covid-19 vaccine rollout.⁴ Dr. John Mascola, director of the N.I.H.'s Vaccine Research Center, also warns that "[t]he total supply of vaccine has always been a concern," and that a vaccine shortage looms in coming months because only two products have so far been authorized for emergency use.⁵

Third, vaccine producers have already warned that the vaccines currently available are less effective against new highly-transmissible variants. As the coronavirus assumes contagious new forms around the world, both Moderna and Pfizer reported that their vaccines, while still effective, offer less protection against at least one known variant.⁶ In lab research that involved testing whether blood from people who had

¹CDC, FACTS ABOUT COVID-19 VACCINES, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/facts.html>.

² See Zaria Gorvett, BBC, HOW EFFECTIVE IS A SINGLE VACCINE DOSE AGAINST COVID-19?, <https://www.bbc.com/future/article/20210114-covid-19-how-effective-is-a-single-vaccine-dose>.

³ *Id.*

⁴ Will Feuer, BIDEN ADMINISTRATION IS TRYING TO FIGURE OUT WHAT'S DELAYING COVID VACCINE SHOTS, CDC SAYS, <https://www.cnbc.com/2021/01/21/biden-administration-is-trying-to-figure-out-whats-delaying-covid-vaccine-shots-cdc-says.html>.

⁵ Sheryl Gay Stolberg and Sharon LaFraniere, New York Times, WARNING OF SHORTAGES, RESEARCHERS LOOK TO STRETCH VACCINE SUPPLY, <https://www.nytimes.com/2021/01/05/us/politics/coronavirus-vaccine-supply.html>; see also Andrius Sytas, Reuters, ENTHUSIASM OVER COVID-19 VACCINES TEMPERED BY TALK OF PROTECTIONISM AND HOARDING, <https://www.reuters.com/article/us-health-coronavirus-vaccines/stick-to-your-word-eu-tells-vaccine-makers-as-supply-chains-wobble-idUSKBN29V1F0>.

⁶ Denise Grady, Apoorva Mandavilli and Katie Thomas, New York Times, AS VIRUS GROWS STEALTHIER, VACCINE MAKERS RECONSIDER BATTLE PLANS,

received the vaccine could still fend off different coronavirus variants, Moderna found that there was a sixfold reduction in the vaccine's neutralizing power against the variant, called B.1.351, than against earlier forms of the coronavirus.⁷ The news from both Moderna and Pfizer-BioNTech underscored a realization by scientists that the virus is changing more quickly than once thought, and may well continue to develop in ways that help it elude the vaccines being deployed worldwide.⁸ Anthony Harnden, a physician who advises the U.K. government, reported "[w]e may well be in a situation where we end up having to have an annual coronavirus vaccine" to cope with emerging strains.⁹

Fourth, we do not know how long the vaccine gives immunity. A new study by the New England Journal of Medicine suggests that the long-term efficacy of Moderna's mRNA-1273 vaccine—and specifically the neutralizing antibody count—may be far shorter than hoped.¹⁰ In the study, some subsets showed neutralizing antibody counts fall anywhere between 50 and 75 percent, suggesting that the neutralizing antibodies in the Moderna vaccine may not last more than a year.¹¹

Last, it is important to view the rollout of the vaccine in federal prisons within the wider "context and failures of BOP to stop the spread of COVID-19." *United States v. Boston*, No. 2:19-CR-00162, 2021 WL 77466, at 4*(S.D.W. Va. Jan. 7, 2021). Despite the BOP's response to the pandemic, there are currently 42,596 federal inmates who have been infected by the virus, 209 of whom have died.¹² In other words, of the 136,970 individuals in BOP-managed institutions and community-based facilities, roughly one-third have been infected by the virus. These latest reported numbers

<https://www.nytimes.com/2021/01/25/health/coronavirus-moderna-vaccine-variant.html>.

⁷ Andrew Joseph, MODERNA'S VACCINE IS LESS POTENT AGAINST ONE CORONAVIRUS VARIANT BUT STILL PROTECTIVE, COMPANY SAYS, <https://www.statnews.com/2021/01/25/moderna-vaccine-less-effective-variant/>

⁸ *Id.*

⁹ Stephen Fidler, NEW CORONAVIRUS VARIANTS COMPLICATE THE BATTLE AGAINST THE PANDEMIC, <https://www.wsj.com/articles/new-coronavirus-variants-complicate-the-battle-against-the-pandemic-11611518097>
<https://www.nature.com/articles/d41586-020-00502-w>

¹⁰ William A. Haseltine, THE MODERNA VACCINE'S ANTIBODIES MAY NOT LAST AS LONG AS WE HOPED, <https://www.forbes.com/sites/williamhaseltine/2020/12/22/the-moderna-vaccines-antibodies-may-not-last-as-long-as-we-hoped/?sh=67d451fa4567>

¹¹ *Id.*

¹² See BOP, COVID-19 Cases, <https://www.bop.gov/coronavirus/> (last visited Jan. 19, 2021).

represent 7,170 more infected inmates and 12 more deaths in just twelve days. See *United States v. McAfee*, No. 18 CR. 425 (JFK), 2021 WL 106268, at *3 (S.D.N.Y. Jan. 12, 2021) (citing the same BOP COVID website that noted 35,426 federal inmates were infected with the virus and 182 died as of January 7, 2021).

Indeed, other district courts have pointed to “the growing evidence of the BOP’s chronic mismanagement of its vulnerable population during the COVID-19 pandemic.” *Woodard v. United States*, No. 2:12-CR-105, 2020 WL 3528413, at *3 (E.D. Va. June 26, 2020); see also *Boston*, 2021 WL 77466, at *4 (noting the BOP’s repeated failure to release vulnerable inmates to home confinement despite directives from the former Attorney General); see also *Wilson v. Williams*, 4:20-cv-00794, 2020 WL 2542131, at *1–2 (N.D. Ohio May 19, 2020) (documenting the “unacceptable” percentage of positive tests at the prison and BOP’s “ineffective[ness] . . . at stopping the spread.”). Regardless of whether this is mismanagement or simply being overwhelmed with the gravity of the pandemic, “it cannot reasonably be said that [the BOP’s] efforts [to protect inmates] have been effective.” *United States v. Rios*, No. CR 19-00006 JAO, 2021 WL 141238, at *6 (D. Haw. Jan. 14, 2021). That is why the government’s request that this Court deny compassionate release because of the BOP’s efforts to vaccinate does not hold water. As one court put it, the argument that the BOP’s efforts “weigh against compassionate release amounts to arguing that the Court should not grant compassionate release in any case because the BOP has at least tried to curb COVID-19. Trying and doing are two different things.” *Id.*

For all of those reasons, Mr. Bonner remains at risk of severe illness or death, even if BOP is able to schedule a first vaccination shot for Mr. Bonner.

Courts are granting compassionate release despite the imminence of vaccines.

Should this Court grant compassionate release for Mr. Bonner despite the imminence of a vaccine, this Court would not be alone. Instead, it would join a growing body of decisions doing the same. See *United States v. Boddie*, 98-cr-00038JMSMJ, 2021 WL 230108, at *1 (S.D. Ind. Jan. 22, 2021); *United States v. Bass*, 97-cr-80235-1, 2021 WL 228904, at *3 (E.D. Mich. Jan. 22, 2021); *United States v. Hargrove*, No. 3:18-cr-0022-2, 2021 WL 170836, at *7 (D. Conn. Jan. 19, 2021); *United States v. Frost*, 16-cr-0582, 2021 WL 229665, at *6 (D. Md. Jan. 22, 2021); *United States v. Ramirez*, 18-cr-20676, 2021 WL 168594, at *4 (E.D. Mich. Jan. 19, 2021). The decision in *Frost* addresses the fact that, even with a vaccination, compassionate release should be considered due to the severe lockdown conditions experienced by people in detention:

“It is also noteworthy that Frost’s incarceration in the midst of a global pandemic has ‘sufficiently increased the severity of the sentence beyond what was originally anticipated such that the purposes of sentencing are

fully met even with the proposed reduction.’ Programming and recreation have either been limited or cancelled altogether, and visitation is either prohibited or restricted.” *Frost*, 16-cr-0582, 2021 WL 229665, at *6.

We cannot demand that Mr. Bonner to take the vaccine where he may have reasonable hesitations about the dangers of vaccines

As a Black man, Mr. Bonner could have reasonable hesitations about taking the vaccine. The United States has an unfortunate and terrifying history of unethical experimentation on the Black community, raising real concerns about taking a vaccine that was rushed into production for emergency use. Consider the well-known “Tuskegee Study of Untreated Syphilis in the Negro Male,” where infected Black men were solicited to be a part of a 40-year study (1932 to 1972) to treat the disease with penicillin and were offered free medical exams, free meals and burial insurance.¹³ But they were not given the drug, and 28 of the original 399 Black men died of syphilis, 100 died of related complications, 40 of their wives were infected, and 19 of their children were born with congenital syphilis.¹⁴

As recently as the 1990s, unethical medical research involving the Black community has been conducted by highly esteemed academic institutions. For example, researchers at a prestigious U.S. university recruited African American boys into a study that hypothesized a genetic etiology of aggressive behavior.¹⁵ Through the use of monetary incentives, they were able to convince parents to enroll their sons in a study that included withdrawal from all medications (including asthma medications), ingesting a mono-amine (low protein) diet, an overnight stay (without parents), withholding of water, hourly blood draws, and the administration of fenfluramine, a drug known to increase serotonin levels and suspected to be associated with aggressive behaviors.¹⁶ In addition to these methods, several other significant human subject violations were cited, including restricting the recruitment to Black children.¹⁷ It is fair to ask whether

¹³ Curtis Bunn, A COVID-19 VACCINE WILL WORK ONLY IF TRIALS INCLUDE BLACK PARTICIPANTS, EXPERTS SAY <https://www.nbcnews.com/news/nbcblk/covid-19-vaccine-will-only-work-if-trials-include-black-n1228371>.

¹⁴ *Id.*

¹⁵ Darcell P. Scharff, PhD, Katherine J. Mathews, MD, MPH, MBA, Pamela Jackson, MA, RN, Jonathan Hoffsuemmer, MPH, Emeobong Martin, MPH, and Dorothy Edwards, PhD, MORE THAN TUSKEGEE: UNDERSTANDING MISTRUST ABOUT RESEARCH PARTICIPATION, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4354806/>

¹⁶ *Id.*

¹⁷ *Id.*

mistreatment of Black Americans that has occurred more recently than the Tuskegee syphilis study gives pause to those considering a COVID-19 vaccine.

Moreover, researchers of pharmacogenetics — the science that studies how genetic factors affect reactions to drugs — stress that medicine could produce different results based on race and genetic, socioeconomic and environmental dynamics.¹⁸ Unfortunatly, of the 350,000 people who had registered online for a coronavirus clinical trial, 10% were Black or Latino, less than a third of the total U.S. population these two groups account for: 31.9%, according to U.S. Census data from 2019.¹⁹ As a result of the underinclusion of Black Americans in studying the vaccine efficacy, it may be that the vaccine is less effective amongst people of color.

The implications of reconsidering Mr. Bonner's order for release are troubling

Should the Court reconsider and deny Mr. Bonner's motion for compassionate release due to the USAO's ability to get BOP to prioritize Mr. Bonner for vaccination, the implications would be troubling. It could give incentive to the USAO and BOP to prioritize compassionate release claimants for vaccination for the purpose of weakening those claimants' motions for release. Should that happen, limited vaccine resources could be diverted from other detained people who are equally in need of the vaccine. More importantly, compassionate release claimants would be forced to decide whether to take the vaccine or to continue with their compassionate release claim. This would be an unfair position to put claimants in, and would set a troubling precedent, undermining notions of fair play and due process while at the same time jeopardizing public health.

For these reasons, we respectfully urge this Court to release Mr. Bonner immediately, so that he may return to his family and protect himself from the ongoing dangers of contracting COVID-19 while in the custody of BOP.

¹⁸ See footnote 12.

¹⁹ Dezimey Kum, FUELED BY A HISTORY OF MISTREATMENT, BLACK AMERICANS DISTRUST THE NEW COVID-19 VACCINES, <https://time.com/5925074/black-americans-covid-19-vaccine-distrust/>

Respectfully Submitted,
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